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NAVIGATING DIGITAL DEFAMATION: INSIGHTS INTO INDIAN LAWS, ISP'S LIABILITY, AND PUBLISHER'S RESPONSIBILITY

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I. ABSTRACT

The global population surge accompanies technological advancements, notably the rise of social media since the early 2000s. Social medias now plays a crucial role in daily life, offering secure and rapid communication and expression opportunities. However, this double-edged sword introduces both positive and negative aspects. While facilitating connectivity, increased social media use also leads to various crimes, notably defamation. This study focuses on defamation as a prevalent cybercrime, examining its occurrence on social media platforms and the broader internet. The publication of derogatory content online makes cyberspace a susceptible domain for such acts, highlighting the complex interplay between technology and legal challenges.

II. KEYWORDS:

online, defamation, tort, internet, technology.

III. INTRODUCTION:

"Anyone with an internet connection and an idea can develop an audience"

~ Kevin Spacey[2]

No words can better describe the current situation of this world, I believe, than the above-stated words. Technology, or social media, to be more precisely, has appeared as a substantial tool for communication between mankind as well as used as a medium to operate digitally, by connecting through tons of individuals, sharing thoughts, ideas, and even commencing start-ups. Statistically, since 2015, the use of the internet has grown enormously. Internet usage in India was below 50% taking into

[1] Student at NMIMS Kirit P. Mehta School of Law.
[2] Take aim: How to target the right audience, Insivia (2022), https://www.insivia.com/take-aim-how-to-target-the-right-audience/

consideration the worldwide average. approximately, 468 million use social media in their day-to-day life whereas 658 million of people use the internet daily.[3] To some extent, youth are engaged and use technology far too much than adults. In contrast, social media is the frontrunner of all the digitised stages. The objective of the social media platforms, I believe is largely the following four grounds;

1) for communication and have opinionated discussions between oneself and others,

2) for presenting ourselves and to freely express oneself,

3) for online business purposes or showing one's talent to the whole world,

And lastly, 4) for entertainment purposes.

To surf the internet, one must have to create a profile and have their actual account and get identified, however this does not apply to all the cases. Some feel comfortable in not revealing or disclosing their identity and hence the term "anonymity" and "pseudonymity" comes ahead. One can operate himself through anonymity i.e., by not revealing their real identity or may use an unknown name, whereas pseudonymity is being used when one uses a fictitious name hiding their identity[4]. The internet becomes interesting, exciting, and helpful until and unless online defamation becomes a massive concern when derogatory statements are made against a reputation of a person, anonymously.

Consequently, it becomes burdensome for the plaintiffs to file a suit in a civil court for the tort of defamation against the defendant because of the non-revealing identity of the defendant and hence here the problem arises. On top of that, ISPs i.e., the Internet service providers and social media web hosts often, also become liable for the liability of defendants. In the view of the fact, editors/publishers/reporters/hosts are to be held liable in the eyes of the defamed person, considering it is their authority and duty to monitor the derogatory content being published on their platforms and take actions promptly. At this moment comes the issue of balancing and imposing liability on the intermediaries for the very deeds of the anonymous, aspersing.

[3]Tanushree Basuroy, Internet Usage in India, statista (Oct. 7, 2022, 7:42 PM), https://www.statista.com/topics/2157/internet-usage-in-india/#dossierKeyfigures
[4] Yaman Akdeniz, Anonymity, Democracy, and Cyberspace, 69 JHU Press. 223, 237 (2002).

Online defamation is also known as cyber defamation where a computer is used as a source to use the internet and publish statements that harm the reputation of other(s). Since, the tort of defamation has been prevailing to a greater extent it was foremost to apprehend the particulars about this independent tort and to have a better understanding of the defamation laws to the roots.

IV. RESEARCH OBJECTIVES:

1. To analyse the defamation laws in India with respect to internet, social media as well as cyber defamation while also taking into consideration caselaws in this arena.
2. To cognize more about the liability imposed on the ISPs (INTERNET SERVICE PROVIDERS) in India.

V. RESEARCH QUESTIONS:

1. How Indian laws deal with intermediaries' liability in contrast with the United Kingdom with respect to anonymous publishers? (ABSOLUTE & LESS ABSOLUTE IMMUNITY)
2. To which extent should the intermediaries be held liable for defamatory content published by an anonymous entity?

VI. RESEARCH METHODOLOGY:

Analysing case laws will be pivotal in exploring online defamation from the perspective of publisher liability. The research will delve into pertinent legal precedents, scrutinizing patterns and evolving interpretations. Additionally, a comparative analysis across jurisdictions will be conducted, shedding light on diverse legal approaches to holding publishers accountable for internet defamation. This methodology aims to offer a nuanced understanding of the legal

landscape surrounding online defamation, emphasizing the challenges associated with establishing liability for publishers in the digital realm.

VII. CONCEPT OF DEFAMATION:

Tort is a civil wrong, which gives rise to loss and harm suffered by the plaintiff/claimant by the deed of the defendant, whether accidentally or intentionally, resulting in the imposition of legal liability. As a consequence, tort law administers the remedies for civil wrong viz; to provide compensation to the injured party. However, some components of tort law can be contrasted with the criminal law, as well.

Under the Indian jurisprudence, defamation is either a civil law or criminal vis-a-vis; punishable with imprisonment or fine or punishable through the award of compensation. Defamation is the act of publishing derogatory, insulting and/or even abusive statements, about and regarding another person, which has repercussions in the damage or harm to the good name and character/reputation of the other.

Furthermore, Libel and Slander are the elements of this tort.

- Libel - publication of statement in written form for e.g.: print, newspaper articles, emails, blogs, and (permanent form) while;
- Slander - is the publication of a statement which is ephemeral in nature (non-permanent). Since the emergence of the internet, there is an immense need to address the issue of defamation done in cyberspace which is known as - Cyber defamation[5].

To have a complete idea of this matter in question of online defamation, we need to understand its crucial elements, rules, and completely delve into the issue at hand.

VIII. DEFAMATION & ITS ELEMENTS:

A. The statement should be incorrect or false

B. It should be defamatory

[5] David Goguen, Social Media and Online Defamation, Nolo (Oct. 7, 2022, 10:27 PM) https://www.nolo.com/legal-encyclopedia/social-media-online-defamation.html

C. It should be published in some manner

D. Should harm the reputation of the plaintiff

And lastly,

E. It should be intended by the defamer.

In order to sue someone for the tort of defamation, the defamed person should take into consideration certain norms and standards. Firstly, the statement made by the defamer is believed to be false about oneself; next, a rudimentary element that is - the statement must be defamatory; in addition to that, it should be published i.e.- communication of the statement to the third party/parties; on top of that, it should damage the very reputation of the plaintiff and last but not the least - the published statement should be intended by the defamer.

However, one cannot succeed in the defamation claim, if the defamer articulates the statement 'only' to the plaintiff alone with no any other person present around or with them and/or writes defamatory content and never publishes it. Hence, no defamation suits arise in such instances.

- ***IDENTIFICATION***:

As this thesis discusses the issue of online defamation on social media in regards with cyber defamation, there arises a need to clarify and apprise the latitude of the identification mandatory to allege for defamation. The plaintiff must prove that the defamatory content is 'published' and that too 'referring to him'. Without publication, there exists no cause of action. Thus, it could be argued that publication and the identity are the basis for libel suit.

- ***DEFENCES UNDER THIS TORT:***

First and foremost, the burden of proof lies within the hands of the plaintiff to prove the publication of the defamatory article appertaining to him/her and that the publication of the content is viewed by some third parties. Besides, the onus probandi shifts to the defendant after the plaintiff proves the aforementioned chore i.e.; defamatory content, publication, identification.

IX. IMMUNITY TO THE DEFENDANT:

1. TRUTH: the defendant can be exempt from the liability imposed on him for the content published, if one can prove that the statement was accurate and precise. After all, defamation is the false statement of fact and hence truth is the ultimate defence for one to spared from the liability.
2. MERELY OPINION: to succeed under this defence, one must establish that the statement published was mere opinion and not facts. Moreover, the opinionated statements should be published or available in some manner to be referred to. If the plaintiff succeeds in that the opinion made by the person is not honest, then the defence fails. However, simply because you defame the opponent by issuing an opinionated statement does not mean it will be elucidated for tort of defamation. The jury will take into consideration certain circumstances i.e.; how well you knew the person defamed, why you made the statement and how precise the statement made was. And so accordingly, the jury foresees whether the statement was an opinion or not.
3. ABSOLUTE PRIVILEGE: Person making a statement has absolute rights, even if it is defamatory. In this scenario, the right to speech of the defamer outweighs the right to reputation of the defamed person i.e., statements published during legislative processes, government reports and so on.
4. QUALIFIED PRIVILEGE: Person making a statement has some right to make that statement i.e., a statement made without malice. And to achieve this defence, the defendant should prove that there was an occasion for making the statement.

X. LAWS DEALING WITH ONLINE DEFAMATION IN INDIA & UNITED KINGDOMS:

In the lack of a civil law, common law has been the sole basis for civil courts [law based on recorded judicial precedents], to establish the defamation liability under civil law. Defamation is the damage to one's reputation caused by the other party's baseless allegations; however, the content must have been published in some manner. Also,

the content should be conveyed to at least one person (third-party communication) and that third person should be able to contextualise the content.

The Indian Penal Code, 1860 under Section 499 criminalises the act of defamation. The provision simply reiterates common law and places a strong emphasis on Men's rea. Both are distinctive, but one crucial and shared feature in this tort is the publication. Assuming, the defamer is behind a mask, hiding the identity, the question arises is who is to be liable? For further information, Sections 66A, 67, 67A of the Information Technology Act[6] and Sections 499, 469, 500, 503 of the Indian Penal Code,1860[7] are some statutory provisions governing online defamation in India.

Indian law does not allow defamed individuals to sue secondary publishers (ISPs), although UK law allows them to do so. However, if an intermediary can prove that it was not the author of the defamatory content, Section 5 of the Defamation Act of 2013[8] allows it to use innocent dissemination as a defence for making defamatory content available; second, it disseminated it with sufficient precaution; and third, it did not know, and had no reason to believe that it had contributed to or caused the publishing of a defamation claim. The defence, however, if the defamed person gave inadequate information regarding the source of the defamatory content to the intermediary, and the intermediary subsequently failed to remove the content or reveal author information to the defamed person. Thus, the United Kingdom's legislation establishes clear legislative limitations on intermediaries' responsibility for posting defamatory remarks. Ultimately, the court cannot decide an action against the person who is not the creator of the statement under Section 10 of the UK Defamation Act 2013[9] unless the judge is convinced that it is not "reasonably possible" to bring an action[10]. Some exceptional cases are mentioned of Indian and UK jurisdiction dealing with ISPs.

[6] Information Technology Act, The Gazette of India, No.13, §§§ 66A, 67 - 67A (2009).
[7] Indian Penal Code, 1860, §§ 469, 499, 500 - 503.
[8] Defamation Act, C. 26, § 5 (2013).
[9] Defamation Act, C. 26, § 10 (2013).
[10] Pratik Dixit, From gatekeepers to publishers: Liability of internet intermediaries in India for hosting defamatory content, 1 NLSIU. 1, 11 (2021).

- GODFREY v. DEMON INTERNET LIMITED (2001)[11] :

This is one of the early judgments in the UK to address the issue of Internet intermediaries' liability for online defamation. In this case, Demon Internet Limited, an Internet service provider (ISP), was sued by Lawrence Godfrey for a newsgroup posting that was hosted on Demon's servers in this jurisdiction. The plaintiff informed the website owner through fax and asked that the content be taken down. On the other hand, the defendant did not do so. Since the plaintiff had informed the firm that he was not the genuine author of the comment, the court determined that the ISP knew or had reason to know that the statement was defamatory. Despite this, the Defendants choose to leave the libellous content up. The court concluded that the firm had no valid defence under the first section of the Defamation Act.

- SMC PNEUMATICS (INDIA) PVT. LTD *v.* JOGESH KWATRA(2014)[12]:

The aforementioned case was the first case of cyber defamation in India wherein the defendant, Mr. Jogesh was an employee in the plaintiff's company. The defendant sent vulgar, abusive, obscene emails to other employees and subsidiaries, defaming the plaintiff. The plaintiff contended the emails were sent with the aim to harm his impeccable reputation; and resulted in the invasion of his legal rights. The aim and intention (Mens rea) of the defendant to destabilise the plaintiff were proved subsequently. After a detailed argument, the Delhi High Court granted an ex parte ad interim injunction based on the prima facie case presented by the plaintiffs.

XI. APPROACH OF INDIAN JURISPRUDENCE WITH RESPECT TO ANONYMOUS USER:

Anonymous online speech complicates the tort of defamation by making it more challenging for the victim/defamed person to "unmask" the identity of the anonymous publishers hiding under their veil and seek justice. Anonymous speech empowers people to express oneself in ways they would never be able to if their

[11] Godfrey v Demon Internet Limited, GFoE, (HC: 1999).
[12] Smc Pneumatics (India) v. Shri Jogesh Kwatra, Indian Kanoon, OS 65/14 (Delhi District Court: 2014).

identities were revealed. The privilege to remain anonymous is not absolute. In the previous system, publishers worked alongside anonymous authors to disseminate anonymous speech.

A recent case has been examined to demonstrate rapprochement for dealing with problems presented by the anonymous publisher in Indian decree.

- **SUBODH GUPTA vs. HERDSCENEAND & Ors (2019)[13] :-**

Subodh Gupta, the plaintiff, was a renowned artist who was made alleged offender of sexual harassment, made by the so-called victims anonymously, on the defendant's provided Instagram platform for alleged victims of sexual harassment against alleged offenders. In 2018, an unknown user posted defamatory allegations against Subodh Gupta. In response, he filed a defamation suit against the defendants: (1) the Instagram page (herdsceneand); (2) Instagram; (3) Facebook Inc.; (4) Facebook Ireland; (5) Google Inc.; (6) Google India Pvt. Ltd; in addition to that- a compensation of Rs. 50 million. The arguments presented by the plaintiff was to remove all the false accusations made on the Instagram page of Herdsceneand and for the search engines to remove the reference to the post and related news articles. As a result, this act caused the reputation and financial losses simultaneously.

On question of whether Herdsceneand should stay anonymous during the proceedings, the counter-arguments being presented by the defendant were- disclosing the identity of its administrator(s) would cause harm for which sufficient protection was not available in the legal system & the victims of the sexual harassment in such #MeToo cases face a large number of issues and thus must be permitted to stay anonymous.

The matter through which the researcher tries to connect with this case is focused whether the court would allow the identity of the publishers to remain anonymous. Justice Endlaw has ruled that the defendant in this case should not be allowed to act as the judge in his or her own case by demanding anonymity and refusing to let the "alleged" accused provide a defence. According to Indian law, the adversarial

[13] Subodh Gupta v. Herdsceneand & Ors, Indian Kanoon, CS(OS) 483/2019 (Delhi HC: 2019).

character of judicial processes, fairness of procedure, and equality of opportunity for all parties are violated when an unknown individual is involved in a lawsuit[14]. However, the Court ultimately ruled in favour of Herdsceneand and allowed the proceedings to resume without revealing the identity of Herdsceneand's administrator to the plaintiff or the public. The Court gave Herdsceneand the choice of either representing the said' accuser's interest behind the post or involving the accuser as a party in the lawsuit. Herdsceneand's administrator's identity private and agreed not to bring any more allegations against Herdsceneand.

Finally, the suit was decided in Gupta's favour, and the anonymous charges were erased from Instagram and Google search results.

In tort, control equals liability. Existing case laws in this area typically focuses on the issue of control. Under the tort law of defamation, liability may be imposed upon the creator of defamatory statement as well as on the disseminator/ISP of the platforms where the material is being published. The amount of control the intermediaries has, so does the liability for publishing the material. Thus, it can be concluded that Indian laws exempts the liability of the ISPs from the deed of anonymous publishers.

There are three mediums through which the content can be disseminated- newspapers (publishers), libraries, bookstores, news vendors (distributors), telephone companies. The magnitude of the punishments to be awarded to the service providers extents to different levels. For instance, newspapers (publishers) are often made liable as they exercise a complete authority over the content disseminated; while on the other hand, telecom companies have no control over the circulation of the statements. The challenging issue arising here is comparing ISP to three common law groups for disseminators might be challenging because to the similarities they share with each category. Even if the courts classify them as one, the classification is not uniform because ISPs maintain varying levels of authority in different places i.e.; the email

[14] Press Trust of India, Anonymity in Litigation Runs Counter to Indian Jurisprudence says HC, Business Standard (Oct. 20, 2022, 7:10 PM) https://www.business-standard.com/article/pti-stories/metoo-can-t-permit-guerilla-warfare-by-allowing-anonymity-to-accusers-says-hc-119112101156_1.html

platforms can be maintained by the service providers while the chatrooms are not[15]. Furthermore, the laws regarding the unmasking of anonymous users are unclear. As a result, plaintiffs who would have previously sued ISPs for damages in libel cases are instead suing the anonymous users directly. However, up until this point, Indian courts have not dealt with complicated questions that they will definitely need to decide in the near future. As a result, the Indian Parliament must foresee these circumstances and include their resolutions in a complete statute that clarifies both the obligations of intermediaries and the boundaries of their liability.

XII. CONCLUSION:

The internet has revolutionized communication unlike any other medium. Defamed individuals, seeking to protect their reputations, face the dilemma of pursuing legal action against ISPs or anonymous publishers. However, suing ISPs often proves ineffective, as these intermediaries benefit from robust defences across jurisdictions. While online anonymity is diminishing with the ability to trace messages to their source, holding an individual accountable for defamation through legal proceedings is a time-consuming and costly process. Courts, grappling with the absence of explicit laws in Indian jurisdiction, resort to principles of equity and justice to assign responsibility to intermediaries in internet defamation cases. To provide a forward-looking perspective, future research could explore potential legal frameworks addressing the evolving landscape of internet defamation, balancing individual rights with technological advancements. This addition would offer insights into the ongoing challenges and possibilities in this dynamic legal domain.

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